

§ 779.370

establishment in the activities within the scope of its own exempt business (see § 779.311(b)). In addition, where an establishment offering complete funeral home services also has outlying chapels where only the funeral services of the deceased persons are conducted, employees of the main establishment who are otherwise exempt do not lose the exemption by virtue of the activities which they may perform in connection with the funeral services held at the chapel. These activities are in such a case part of their employment by the exempt main establishment.

CEMETERIES

§ 779.370 Cemeteries may qualify as exempt 13(a)(2) establishments.

(a) *General.* A cemetery may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that section, including the requirement that the retail or service establishment be open to the general public. So long as a cemetery is open to any persons of a particular religion rather than merely the members of a specific organization or place of worship, it will be considered for enforcement purposes to be "open to the general public."

(b) *Annual dollar volume.* As used in the Act, annual gross volume means the gross receipts from all the business activities of the establishment during a 12-month period (see §§ 779.265 through 779.269). Sums received from the following types of transactions are part of the annual gross volume of sales made or business done:

- (1) Sales of lots or plots.
- (2) Annual tax or assessment levied on lot owners, and
- (3) Gifts or bequests.

Interest from any trust funds for permanent or current maintenance is also included in the annual gross volume of sales made or business done. The allocation of the gross receipts to any trust funds or other accounts of the establishment does not affect the annual gross volume.

(c) *Nonretail sales or income.* Sales of lots or plots to a burial society or a fraternal organization for the use of the members are sales for resale and as such may not be counted as part of the

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75 percent of annual dollar volume of sales of goods or services which is not for resale and recognized as retail in the industry under section 13(a)(2). Such sales are counted as part of the annual gross volume in the period in which the transaction between the cemetery and the burial society or fraternal organization is completed. Any interest from trust funds or other investments also is not recognized as retail receipts under section 13(a)(2).

AUTOMOBILE, TRUCK, FARM IMPLEMENT, TRAILER, AND AIRCRAFT SALES AND SERVICES

§ 779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).

(a) *General.* The specific exemption from the provisions of sections 6 and 7 of the Act that was provided in section 13(a)(19) prior to the 1966 amendments for employees of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements was repealed. However, some such establishments may qualify for exemption from both the minimum wage and overtime pay provisions of the Act under section 13(a)(2) as retail or service establishments. These are establishments whose annual dollar volume is smaller than the amount specified in section 13(a)(2) or in section 3(s)(1) and which meet all the other requirements of section 13(a)(2) (see § 779.337). (Such establishments which do not qualify for exemption under section 13(a)(2) may have certain employees who are exempt only from the overtime pay provisions of the Act under section 13(b)(10). Section 13(b)(10) is applicable not only to automobile, truck, and farm implement dealers but also to dealers in trailers and aircraft. The section 13(b)(10) exemption is discussed in § 779.372 below.)

(b) *Application of the 75-percent test.* In determining whether, under the section 13(a)(2) exemption, 75 percent of an automobile, truck, or farm implement establishment's sales of goods or services are not for resale and are recognized as retail, the requirements for such classification, including the existence of a retail concept, as explained

previously in this subpart, and the specific applications in the industry of these requirements in accordance with the following principles, will govern the classification of sales made by such establishments. The sales of goods or services described in paragraph (c) of this section and in paragraphs (e)(1) through (5) of this section may not be counted toward the required 75 percent. Such sales do not qualify as retail because they either are for resale, are outside the retail concept, or have been determined to lack the requisite recognition as retail sales or services. Other sales of goods or services by the dealer can qualify if they meet the requirements previously explained.

(c) *Nonretail automobile and truck sales and servicing.* None of the following sales of automobiles, trucks, automotive parts, accessories, servicing and repair work will be considered as retail:

(1) *Sales for resale.* For example, sales of new or used automobiles and trucks, tires, accessories or services, to service stations, repair shops and automobile or truck dealers, where these establishments resell the various items or where they use them in repairing customers' vehicles or in reconditioning used cars for resale, are sales for resale. (Note that a "sale" for purposes of the Act need not be for profit under section 3(k) it includes any "exchange * * * or other disposition".) However, internal transfers of such items between departments within the dealer's establishment, such as transfers of parts from the parts department to the service department of an automobile dealer's establishment, will not be considered sales for resale. Such transfers from one department to another will be disregarded in computing the establishment's sales for determining the applicability of this exemption.

(2) *Sales made pursuant to a formal invitation to bid.* Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to the Federal, State, and local governments are typically made in this manner.

(3) *Fleet sales.* Sales in a fleet quantity for business purposes (a sale of five or more cars or trucks at a time, for example); and sales to fleet accounts as described in paragraphs (c)(3) (i) and (ii) of this section. (As here used, a "fleet account" is a customer operating five or more automobiles or trucks for business purposes.)

(i) *Automobiles and trucks.* Sales and term leases of automobiles and trucks to national fleet accounts as designated by the various automotive manufacturers, at fleet discounts, and sales and term leases to other fleet accounts at discounts equivalent to those provided in sales to national fleet owners are not recognized as retail.

(ii) *Automotive parts and accessories.* Sales of parts and accessories to fleet accounts at wholesale prices are not recognized as retail. Wholesale prices are prices equivalent to, or less than, those typically charged on sales for resale.

(4) Sales and term leases of specialized heavy motor vehicles or bodies (16,000 pounds and over gross vehicle weight) and of tires, parts, and accessories designed for use on such specialized equipment. The following is a partial list illustrating the types of items of equipment not considered to qualify as subjects of retail sale:

(i) Single unit trucks, including:

Armored (money carrying).
Buses (integral).
Coal.
Drilling.
Dump.
Hook and ladder (fire department).
Chemical wagons (fire department).
Garbage.
Mixer.
Refrigerator.
Special public utility.
Steel haulers.
Street-cleaning.
Tank.
Wrecker.

(ii) Full trailers and semitrailers (tractors and semitrailer and truck and trailer combinations), including:

Auto carrier.
Coal.
Dump.
Garbage.
House carrier.
Low bed carry all.
Pole (lumber).

Refrigerator.
Tank.
Van.

(5) Sales of servicing and repair work peculiar to the servicing and repair of specialized vehicles referred to in paragraph (c)(4) of this section, or performed under a fleet maintenance arrangement on trucks and other automotive vehicles whereby the establishment undertakes to maintain a customer's fleet at a price below the prevailing retail prices.

(6) Sales to motor carriers of services, fuel, equipment, or other goods or facilities by establishments commonly referred to as truck stops. Such establishments, which are physically laid out and specially equipped to meet the highway needs of the motor transportation industry, offer a variety of services to truckers on a "one-stop" basis, and provide services principally to motor carriers and their crews. They are an integral part of the interstate transportation industry and are not within the traditional retail establishments (see paragraphs (c) (4) and (5) of this section).

(7) Sales of diesel fuel (and LP gas) for use as truck or bus fuel and the repair and servicing of trucks and buses used in over-the-road commercial transportation (including parts and accessories for such vehicles) are specialized goods and services "which can never be sold at retail * * * whatever the terms of the sale." (*Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963; *Wirtz v. Steepleton General Tire Company, Inc.*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.) Sales of these items are non-retail whether made by truck stops or other establishments (see paragraphs (c) (4) and (5) of this section).

(d) *Nonspecialized truck parts, accessories and services.* Sales of parts and accessories which are of the type used by small trucks engaged in local transportation or by farm vehicles and are not nonretail under paragraph (c)(6) of this section will be tested under paragraphs (b) and (c)(3) (ii) of this section, even when made on occasion for use in larger vehicles. Likewise, repairs and servicing of a minor nature (such as tire repair, battery recharging, cleaning of fuel lines, or minor electrical re-

wiring) performed on any type vehicle will be considered retail in nature unless nonretail under paragraph (c)(6) of this section or unless a fleet maintenance arrangement as in paragraph (c)(5) of this section is present.

(e) *Farm implement sales.* Sales of farm machinery, such as equipment necessary for plowing, planting, thinning, weeding, fertilizing, irrigating, and harvesting of crops, and raising of livestock on the farm, and the repair work thereon, will be considered as retail (whether sold to farmers or nonfarmers) when they satisfy the tests referred to in paragraph (b) of this section. The following, which fail to satisfy these tests, must be classified as nonretail:

(1) *Sales for resale.* For example, sales of new or used machinery, parts, accessories or services to service stations, repair shops and other dealers, where these establishments resell these items or where they use them in repairing customers' farm implements or in reconditioning used farm implements for resale, are sales for resale. However, this does not apply to internal transfers of such items between departments within the dealer's establishment. Transfers of parts from the parts department to the service department of a farm implement dealer's establishment will not be considered sales for resale, and will be disregarded in computing the establishment's sales for determining the applicability of the section 13(a)(2) exemption.

(2) *Sales made pursuant to formal invitation to bid.* Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to Federal, State and local governments are typically made in this manner.

(3) Sales of specialized equipment not ordinarily used by farmers, such as:

Bulldozers.
Scrapers.
Land levelers.
Graders.
Cotton ginning machinery.
Canning and packing equipment.

(4) Sales of junk.

(5) *Sales of machinery or equipment which are sold "installed", where the installation involves construction work.* Installations which require extensive planning, labor and use of specialized equipment ordinarily constitute construction work. In such cases the cost of installation ordinarily is substantial in relation to the cost of the goods installed.

(f) *Quantity sales to farmers.* It should be noted that the concept of fleet sales discussed in paragraphs (c)(3) and (5) of this section is not applied to sales to farmers, even though the farmer uses five or more vehicles on his farm.

(g) *Particular activities which lack a retail concept.* Any receipts derived from warehousing, construction, including water well drilling, or manufacturing activities performed by the automobile, truck, or farm implement dealer are not receipts from retail sales. These activities and the manufacturing of farm implements are not retail activities.

§ 779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, trailers, farm implements, or aircraft. Section 13(b)(10) states that the provisions of section 7 shall not apply with respect to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

- (i) The establishment must not be engaged in manufacturing; and
- (ii) The establishment must be primarily engaged in the business of sell-

ing automobiles, trailers, trucks, farm implements, or aircraft to the ultimate purchaser. If these tests are met by an establishment the exemption will be available for salesmen, partsmen, and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. An explanation of the term "employed by" is contained in §§ 779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership (H. Rept. No. 1366, 89th Cong., second session, page 42; Sen. Rept. No. 1487, 89th Cong., second session, page 32). However, the salesman, partsman, or mechanic, to qualify for exemption, must be "primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." (H. Rept. No. 2004, 89th Cong., second session, pp. 7, 19.)

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships which qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm implements, but also includes dealers in aircraft and trailers.

(c) *"Salesman, partsman, or mechanic."*

(1) As used in section 13(b)(10), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.